No. 77-1810

IN THE

Supreme Court of the United States

October Term, 1978

ARIZONA PUBLIC SERVICE COMPANY, EL PASO ELECTRIC COMPANY, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, SOUTHERN CALIFORNIA EDISON COMPANY, and TUCSON GAS & ELECTRIC COMPANY,
Appellants,

v.

ARTHUR B. SNEAD, Director of the Revenue Division of the Taxation and Revenue Department, REVENUE DIVISION OF THE TAXATION AND REVENUE DEPARTMENT, and STATE OF NEW MEXICO,
Appellees.

On Appeal From The Supreme Court of New Mexico

MOTION TO DISMISS OR AFFIRM

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The Appellees move the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of New Mexico on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

The following questions are presented by this appeal:

1. Is the New Mexico Electrical Energy Tax Act discriminatory within the meaning of §2121(a) of the Tax Reform Act of 1976 if it subjects all electricity generated in the state to the same tax rate regardless of where it is ultimately sold and if electricity subsequently sold at retail in New Mexico is further subject to the New Mexico Gross Receipts (sales) Tax reduced only by the lesser Electrical Energy Tax already paid?

2. May a state, consistent with the limitations imposed by the Commerce Clause, impose a tax on the generation of electricity occurring within its borders?

3. Does a state tax on the generation of electricity occurring solely within its borders violate the Commerce Clause and the Due Process Clause of the Fourteenth Amendment?

4. Is it a violation of the Import-Export Clause for a state to impose a tax on the generation of electricity occurring solely within its borders?

COUNTER-STATEMENT OF THE CASE

The Four Corners and San Juan generating plants were constructed in the northwest corner of New Mexico to take advantage of an abundant thirty-year coal supply which could be strip-mined there. The availability of coal, one of the least expensive fuels, coupled with the economies of high voltage transmission result in relatively low-cost electrical energy for the consortium of Arizona, California and Texas utilities which participate in the plants and for their consumers. If New Mexico electricity were unavailable to the Appellants, and they had to generate the equivalent amount of electricity at their next-most economical plants outside New Mexico, their costs would

increase by a minimum of 124 million dollars a year (R.792). In contrast, payment of New Mexico's Electrical Energy Tax will cost Appellants about five million dollars a year.

Long-distance transmission permits the Appellants to deliver "clean" energy in Los Angeles and Phoenix while avoiding strictures against coal-burning plants in densely-populated areas. Instead, it is New Mexico which suffers a minimum of twelve million dollars of environmental damage annually from these plants (R.906). Further, the increase in population and related socio-economic problems arising directly from the presence of the generating plants in New Mexico burden state and local governments with twenty-seven million dollars in additional annual costs (R.849).

The rate of taxes paid by Appellants to all taxing jurisdictions within and without New Mexico on their total revenues from generating, transmitting and distributing electricity averages 15% of their total costs (R.793). Taxes paid to all collecting jurisdictions in New Mexico currently account for only 7% of the costs of generation, excluding the Electrical Energy Tax (R.793). Inclusion of the Electrical Energy Tax would raise the taxes paid to all collecting jurisdictions in New Mexico to 12% of the cost of generation (R.793). Thus, in proportion to the value of Appellants' activities in New Mexico, the State has received less in taxes than other governmental jurisdictions, and collection of the Electrical Energy Tax will only partially correct the disparity.

The Electrical Energy Tax is levied at a flat four-tenths of one mill ($.0004) on each net kilowatt hour of electricity generated in New Mexico. Expressed as a percentage of the average retail price of the electricity generated by Appellants in New Mexico, the Electrical Energy Tax is imposed at a rate of less than 2% (R.793). As the retail price of electricity increases, as it surely will, the Electrical Energy Tax will represent an increasingly smaller percentage of this price. Contrary

to Appellants' repeated assertions (Juris. Statement 12, 16-17, 21, 22), *every* generator pays the Electrical Energy Tax, regardless of whether the electricity will ultimately be sold in New Mexico or elsewhere, §§72-34-3, 72-34-5, N.M.S.A. 1953 (1975 P.S.).

Electricity sold at retail in New Mexico is also subject to the New Mexico Gross Receipts tax, the equivalent of a sales tax, §§72-16A-3(F), 72-16A-3(I) and 72-16A-4, N.M.S.A. 1953. The Gross Receipts Tax liability is reduced by the amount of Electrical Energy Tax which has already been paid by the generator §72-16A-16.1, N.M.S.A. 1953 (1975 P.S.). The Gross Receipts Tax rate of four percent is more than double the Electrical Energy Tax liability on a unit of electricity. Crediting the latter tax against the amount of the former always leaves a sizable balance to be paid only on electricity sold at retail in New Mexico. Thus all electricity, whether sold within or without New Mexico, is subject to the Electrical Energy Tax at the same rate, equal to less than two percent of the average retail cost. Further, electricity sold within New Mexico is also subject to the New Mexico Gross Receipts Tax, reduced by the Electrical Energy Tax already paid, for a total tax equal to four percent of the retail price.

According to uncontroverted expert evidence in this case, the generation of electricity is an event which is local to the place in which it occurs and which is separable both mechanically and economically from transmission and distribution (R.791-792). This assertion is effectively conceded by Appellants who note that at the time electricity is generated (and the Electrical Energy Tax attaches), "the particular market in which it will be distributed cannot be identified" (Juris. Statement 5).

THIS APPEAL DOES NOT PRESENT SUBSTANTIAL FEDERAL QUESTIONS AND SHOULD ACCORDINGLY BE DISMISSED

1. The Settled Case Law Totally Supports The Decision By The Supreme Court Of New Mexico

The sole issue in this appeal which presents any possible novelty is the effect on New Mexico's Electrical Energy Tax Act of Section 2121(a) of the Tax Reform Act of 1976, 15 U.S.C. §391. This is discussed in detail *infra.* All other issues raised by Appellants are clearly settled in New Mexico's favor under applicable law. Most directly on point, in 1974 this Court dismissed for want of a substantial federal question the appeal in *Public Utility District No. 2 v. State,* upholding a tax strikingly similar to the one challenged here, 82 Wash.2d. 232, 510 P.2d. 206 (1973), appeal dismissed, 414 U.S. 1106 (1974).

The *Public Utility District No. 2* case, *supra,* coupled with *Alaska v. Arctic Maid,* 366 U.S. 111 (1961), *South Carolina Power Company v. South Carolina Tax Commission,* 52 F.2d 515 (E.D.S.C. 1931), *aff'd* 286 U.S. 525 (1932) and *Utah Power & Light Company v. Pfost,* 286 U.S. 165 (1932) establish the following controlling propositions in evaluating the legality of a state tax on the generation of electricity: First, the generation of electricity is a local incident, separable from the process of transmission. Therefore, a tax on generation is not *per se* a forbidden tax on interstate commerce.

Second, in determining whether a particular tax discriminates against interstate commerce, the impact of the entire tax structure of a state on a particular *commodity* is considered, rather than any one tax or taxpayer in isolation. This inquiry stops at the boundaries of the state levying the challenged tax. In other words, if the total taxes levied by a state on a particular commodity are higher for the commodity ultimately sold within the

state than for the commodity ultimately sold outside the state, there is no discrimination.

(Attached hereto as Appendix A is an excerpt from New Mexico's Brief in Opposition in *Arizona v. New Mexico,* 425 U.S. 794 (1976), a case raising the same issues as the present matter. This excerpt discusses the cited cases in detail and may be referred to by the reader, avoiding excessive length in the present brief).

The commodity of electricity is taxed by New Mexico at a flat four-tenths of a mill per kilowatt hour at the point of generation, regardless of whether it will ultimately be sold in New Mexico or elsewhere, §§72-34-3, 72-34-5, N.M.S.A. 1953 (1975 P.S.). Electricity later sold at retail in New Mexico is subject to the full rate of the New Mexico Gross Receipts Tax minus the lesser amount of Electrical Energy Tax which has already been paid, §72-16A-16.1, N.M.S.A. 1953 (1975 P.S.). Effectively, this imposes an additional tax exclusively on electricity sold at retail in New Mexico equal to more than 2% of its retail value. Therefore, New Mexico's tax structure imposes a greater tax burden on electricity generated and sold in New Mexico than on electricity generated in New Mexico and sold elsewhere.

The only basis for any discrimination argument is the credit against Gross Receipts Tax allowed by §72-16A-16.1(B), N.M.S.A. 1953. The obvious purpose of this provision is to collect a tax only once from in-state sellers, not to impose the Electrical Energy Tax in addition to the 4% Gross Receipts Tax. The in-state sale of electricity generated in New Mexico is not exempted; it is taxed, just as the out-of-state electricity is, and at the significantly *higher* rate of 4%. The legislative purpose is no different from that found by the Washington Supreme Court in the case of *Public Utility District No. 2 v. State, supra,* where it sustained a privilege tax on electricity so close to the tax at issue here as to foreclose Appellants' commerce clause contentions in this case.

In rejecting the utilities' claim of discrimination, the Washington Supreme Court stated:

> "The public utility *tax on electrical power* originating in this state *is to be imposed only once* under the Washington taxing scheme. The deduction here at issue permits this singular tax imposition by preventing the pyramiding effect of the public utility tax, which is otherwise certain to occur. The only relevant difference between the present case and *Crown Zellerbach* is that, rather than having an interrelated tax structure (manufacturing-wholesaling) imposed, this case has a shifting tax structure in which singular tax liability exists but shifts to another utility. By so doing, the in-state distribution of the use of power is *not* exempted and is taxed, just as is the out-of-state distribution of power. Equal treatment is the theme of this system. H & B Communications Corp. v. Richland, 79 Wash.2d 312, 484 P.2d 1141 (1971). The out-of-state utility is in no worse position than its in-state competitor. The state is playing no favorite with its resident businesses at the expense of similarly situated out-of-state enterprises.
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> * * *
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> "The confusion results, in part, because the respondents look only to their status as complaining public utilities at the time of their sales to in-state or out-of-state purchasers, and not to the impact of the total tax structure on the subject matter here involved, the disposition and use of power. *If the whole tax scheme is evaluated, the tax deduction that is made at the sale to a Washington utility is made up at the time the Washington utility buyer sells to its customers.* Thus, 'In the instant case, there is no burden on interstate commerce that is not placed on intrastate commerce.' H & B Communications Corp. v. Richland, *supra,* 79 Wash.2d at 314, 484 P.2d at 1144. The in-state and out-of-state disposition of power is equally treated. There is tax equivalence here and no discrimination on interstate commerce."

"Judgment reversed." 510 P.2d at 211.

[Emphasis added.]

Similarly, New Mexico's intention with respect to electrical energy generated and sold by utilities in New Mexico is that the transactions be taxed only once. Consequently, the legislature has provided that the Electrical Energy Tax may be credited against the Gross Receipts Tax due on subsequent sales in New Mexico. Obviously, the same result could have been accomplished by imposing the type of tax and deduction sustained in the Washington *Public Utility District No. 2* case. The tax effect is the same in both structures; the difference lies only in the form of the two systems, not in their substance.

Utah Power & Light Company v. Pfost, supra, holds that the generation of electricity is a local activity separable from subsequent interstate transmission. Were this not the case, *Complete Auto Transit v. Brady,* 430 U.S. 274 (1977) and *Dept. of Revenue of the State of Washington v. Ass'n of Washington Stevedoring Companies,* ___U.S. ____, 98 S.Ct. 1388 (1978) permit a state to tax even interstate activities to the full extent of their local occurrence. *Michigan-Wisconsin Pipeline Company v. Calvert,* 347 U.S. 157 (1954) on which Appellants rely (Juris. Statement 3, 21, 22) does not avail them since it specifically distinguishes a tax on the generation of electricity from the gas transmission tax which was struck down there, at 168.

Appellants assert that generators which sell their electricity at retail in New Mexico do not pay the Electrical Energy Tax and further claim that the tax is actually on the transmission of electricity, not its generation. As explained in the Statement of the Case herein, *every* generator pays the Electrical Energy Tax, regardless of whether the electricity will ultimately be sold in New Mexico or elsewhere, §§72-34-3, 72-34-5, N.M.S.A. 1953 (1975 P.S.). Furthermore, the tax is clearly on the activity of generation, an event which is local to the place in which it

occurs and which is separable both mechanically and economically from transmission and distribution, *Utah Power & Light Company v. Pfost, supra.* Indeed, Appellants concede that at the time the Electrical Energy Tax attaches, "the particular market in which it [electricity] will be distributed cannot be identified" (Juris. Statement 5).

Appellants further assert that the allegedly discriminatory nature of the Electrical Energy Tax is particularly evident when "generator-wholesalers" (i.e., generators which sell their electricity to other utilities for sale at retail) are examined in isolation (Juris. Statement 7, 19). It is hard to see why special significance is attached to wholesale transactions. As explained earlier, *every* generator pays the Electrical Energy Tax regardless of whether the electricity is ultimately sold in New Mexico or elsewhere. Furthermore, *no* generator of electricity which sells at wholesale is subject to the New Mexico Gross Receipts Tax, the equivalent of the state sales tax (Juris. Statement 7).

The contention that the Electrical Energy Tax places Appellants at a competitive disadvantage with New Mexico utilities (Juris. Statement 17) is unsupported by any substantial evidence in the record that such competition takes place, that it is of any significant magnitude, or that Appellants are actually disadvantaged.

2. The Electrical Energy Tax Act Does Not Violate §2121(a) Of The Tax Reform Act Of 1976, 15 U.S.C. §391

Section 2121(a) of the Tax Reform Act of 1976 provides:

> No State, or political subdivision thereof, may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers,

> or consumers of that electricity. For purposes of this section a tax is discriminatory if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.

Appellants presumably contend that this section establishes a new test of what constitutes a discriminatory tax on the generation of electricity, different from the test established by the case law discussed in the preceding section under which the Electrical Energy Tax would be sustained. However, no new test is discernible since §2121(a) unambiguously preserves the two fundamental propositions from the case law – that generation is a *local event* and that one looks to a state's *entire tax structure* as applied to a given *commodity* in determining whether a particular tax is discriminatory. The section by its clear wording does not invalidate New Mexico's Electrical Energy Tax Act. The innocuous nature of the statute was highlighted when its sponsor, Senator Fannin, assured the Senate that it would not invalidate Washington's utility tax, closely analogous to New Mexico's, 122 Cong. Rec. S12714 (daily ed. July 28, 1976).

The operative test of a discriminatory tax under §2121(a) is whether

> it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.

The Electrical Energy Tax does not "directly" place a greater burden on electricity destined for out-of-state transmission. Both New Mexico utilities and out-of-state utilities pay the same generating tax at the same rate. Section 72-34-3, N.M.S.A. 1953.

In determining whether the Electrical Energy Tax "indirectly" results in a greater burden on out-of-state electricity, §2121(a) affirmatively preserves the test found in the *Public Utility District No. 2* case, *supra*: in determining the effect of a tax, one looks at the *entire tax structure* of a state as applied to the *particular commodity* which is taxed. Thus, the statute directs us to look at the "tax burden on *electricity*", not the tax burden on generation. There is no limitation as to which state taxes are to be scrutinized in deciding whether a "greater tax burden" has resulted. Obviously, in looking for "indirect" burdens as the section commands, one must of necessity consider all taxes which a state levies on electricity. In the instant case, the pertinent tax is the Gross Receipts (sales) Tax which, although reduced by the amount of the Electrical Energy Tax, continues to impose a burden on electricity sold in New Mexico from which electricity sold out-of-state is exempted.

Appellants contend that the reduction of the New Mexico sales tax on electricity proportionate to the Electrical Energy Tax paid on the same commodity causes a "greater tax burden" on electricity sold out-of-state than on electricity sold in New Mexico. But they misread the section's language: as the dictionary makes clear, the word "greater" means "larger", not "additional".*

The test of discrimination under §2121(a) is not whether a tax imposes an *additional* burden on out-of-state electricity compared to the situation prior to passage of the tax. Rather, the test is whether a generation tax results in a *larger* total tax

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* GREAT, a.; *comp.* greater; *superl.* greatest. [AS. *great*, great, large.] 1. Large in bulk or dimensions; to extended length or breadth; of large number; as, a *great* multitude. . . .

ADDITIONAL, *a.* Supplemental; added; increased or increasing in any manner.

New Twentieth Century Dictionary unabridged, The Publishers Guild, New York (1943).

on each unit of electricity sent out of New Mexico than the total tax on each unit of electricity consumed in New Mexico. Even with the reduction in the in-state sales tax, the amount of Electrical Energy Tax paid by in-state producers coupled with the remaining liability for the in-state sales tax exacts a "greater" [larger] tax on electricity destined for in-state consumption.

As noted earlier, the rate of the Electrical Energy Tax equals less than two percent of the average retail value of the electricity that is generated (R.793). Therefore, utilities selling out-of-state pay the two percent Electrical Energy Tax and utilities selling in New Mexico pay the two percent Electrical Energy Tax. The in-state retail sale of electricity gives rise to a sales tax at the effective rate of an additional two percent above the Electrical Energy Tax (i.e., the four percent Gross Receipts Tax, reduced by the amount already paid as Electrical Energy Tax). Thus, while the utility selling out-of-state is paying an additional tax that it was not previously required to pay, payment of this tax does not result in a "*greater*" [larger] burden on the electricity transmitted out-of-state.

Appellants apparently assume that because New Mexicans have been paying a 4% tax on electricity all along, the imposition of a 2% tax on electricity sold out-of-state results in a "greater" burden on out-of-state than on in-state electricity. This is not the case. There is now an *additional* tax on out-of-state electricity that was not there before, but the tax burden is still well below the in-state burden on electricity, and is not forbidden by §2121(a).

This Court has said on numerous occasions that its duty is to look at the particular effect of a tax structure, not the labels which a legislature affixes to its tax laws, *Stewart Dry Goods Company v. Lewis,* 294 U.S. 550, 55 S.Ct. 525 (1934). For example, in *City of Detroit v. Murray Corporation,* 355 U.S. 489 (1957), this Court recognized that a tax labeled a "property" tax was really a tax on the use of the property and

therefore did not constitute a forbidden tax on United States property.

> . . . in passing on the constitutionality of a state tax "we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it." [cite omitted] . . . we must look through form and behind labels to substance. This is at least as true to uphold a state tax as to strike one down.
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> *Id.* at 492.

In the instant case, New Mexico has chosen to reduce its sales tax on electricity. To do so does not "indirectly" place a larger burden on electricity sold out-of-state than on electricity sold in New Mexico. The latter is still saddled with a greater tax burden.

A second reason why §2121(a) does not invalidate New Mexico's tax is that it only forbids imposing a greater tax burden on "electricity which is generated. . . in interstate commerce than on electricity which is generated . . . in intrastate commerce". All the generation activities which New Mexico taxes, including generation by the Appellants, are solely in *intrastate* commerce and outside the purview of §2121(a).

Section 2121(a) does not identify the circumstances in which electricity might be "generated . . . in interstate commerce". Neither the section nor its legislative history contains any finding that the generation of electricity is ever in interstate commerce. This may be contrasted with the earlier version of the statute approved by the Senate Finance Committee and passed by the Senate (but later revised in the Senate-House conference) which explicitly dealt with "the generation of electricity *for* transmission in interstate commerce", see Appendix B, emphasis added, and discussion in Section 3 of this brief, *infra.*

Utah Power & Light Company v. Pfost, supra, held that electricity generated as the utilities here generate in New Mexico

is a local incident outside of interstate commerce. Uncontested evidence in this case establishes that the electricity at issue here is generated in intrastate commerce (R.791-792). Appellants themselves concede that prior to the time that New Mexico energy is transformed for transmission, the market in which energy will be distributed cannot be identified, (Juris. Statement 5). Section 2121 does not bar a tax on the electricity which Appellants generate in New Mexico because it is generated solely in *intra*state commerce.

3. The Legislative History Cited By Appellants Concerns A Test Of Discrimination Other Than The One Ultimately Enacted In §2121(a). It May Properly Be Ignored.

Appellants contend that whatever the infirmities of language in §2121, the legislative history indicates congressional intent that its test of discrimination was meant to outlaw New Mexico's Electrical Energy Tax. Looking at the meager legislative history on which Appellants rely, we find that it deals with a totally different test of discrimination from that which was ultimately passed. Senator Fannin first proposed a measure to ban the Electrical Energy Tax in the Senate. This bill was sent to the Senate Finance Committee which issued its report analyzing and approving the provision, S. Rep. No. 94-938-Part I, 94th Cong., 2d Sess. 437-438 (1976), as reported in 1976 U.S. Code Cong. & Ad. News 3865-66. The bill approved by the Senate Finance Committee is reproduced in Appendix B herein (R. 1, 031). The amendment proposed by Senator Domenici (Juris. Statement 14) sought to strike the bill as approved by the Senate Finance Committee, 122 Cong. Rec. S12712 *et seq.* (daily ed. July 28, 1976). The Senate later passed the bill approved by the Senate Finance Committee, 122 Cong. Rec. D1093 (daily ed. Aug. 6, 1976).

However, subsequent to Senate passage, the sponsors of the bill decided to make it part of the Tax Reform Act package and

requested a conference of the House, 122 Cong. Rec. D1094 (daily ed. Aug. 6, 1976). The Senate measure then went to a House-Senate Conference Committee. 122 Cong. Rec. D1144 (daily ed. Aug. 25, 1976), which discarded the Senate bill's test of a discriminatory tax and devised a new test. This new test is the one which was ultimately passed by both the Senate and the House in the Tax Reform Act of 1976 and signed into law by the President.

The differences between the test of discrimination which the Senate Finance Committee report discusses and the test actually enacted are quite significant. As stated by Arizona Public Service's own counsel who drafted them for Senator Fannin, the differences were "critical", R.701-702, reproduced as Appendix C herein.

The Senate Finance Committee had made the test "payment of a higher gross or net tax", an approach which focussed on the effect of a single tax, – the generation tax –, rather than focussing on the total "tax burden" on the electricity, see Appendix B. The evidence in the record in this case indicates that the test approved by the Finance Committee was deleted to appease West Virginia whose generation tax was threatened, see Appendix C.

While no rule of law forbids resort to legislative history as an aid to construction of a statute, *Train v. Colorado Public Interest Research Group,* 426 U.S. 1, 10, 96 S.Ct. 1938 (1975), this Court has declined to do so where a statute was unambiguous on its face and particularly where the legislative history created doubt rather than resolving it, *Railroad Commission of Wisconsin v. Chicago, B. & Q. R. Company,* 257 U.S. 563, 42 S.Ct. 232, 238 (1922); *Packard Motor Car Company v. National Labor Relations Board,* 330 U.S. 485, 67 S.Ct. 789 (1947); *United States v. Oregon,* 366 U.S. 643, 81 S.Ct. 1278 (1961). In the instant case, §2121(a) gives no clue that a reduction in New Mexico's sales tax on electricity equal to its universally-

applied tax on generation would run afoul of its provisions. The inconsonance between the supposedly pertinent legislative history and the statute as passed is readily explained by the change in the test of discrimination subsequent to the preparation of the Senate Finance Committee report.

The difference between the original bill and the enacted statute is more than a matter of changing a few words. What was changed was the basic test of discrimination, the entire point of the statute. That the test was changed is evident: the enacted statute preserved West Virginia's generation tax; the Senate Finance Committee's bill did not, see Appendix C. Ironically, the need to placate all the other states having generation taxes took the drafters full-circle, resulting in a statute which simply codified the existing case law. As noted earlier, this case law amply sustains the New Mexico tax. Whether this result was intended or not, it is hardly accurate to say it renders the statute "essentially meaningless", (Juris. Statement 15).

As noted earlier, the bill's sponsor advised the Senate that even under the Senate Finance Committee version, Washington's utility tax would not be invalidated, 122 Cong. Rec. S12714 (daily ed. July 28, 1976). Since the Washington tax, upheld in the *Public Utility District No. 2* case, *supra*, is closely analogous to New Mexico's tax, whether even the Senate Finance Committee version would have banned New Mexico's tax is problematic.

The plain fact is that Appellants set out to accomplish an impossible task. They wished to steer a bill through Congress which would outlaw New Mexico's tax but no other state's. Otherwise it could not pass. They attempted to accomplish this end by securing passage of an essentially innocuous statute and placing the "teeth" of the statute in the legislative history. Indeed, all other states were assured that "[t]his provision is not intended to prohibit . . . any other State which currently imposes a nondiscriminatory tax on the generation of electricity",

S. Rep. No. 94-938-Part I, 94th Cong., 2d Sess. (1976), *supra*. Because the initial version of the bill was still not sufficiently innocuous, Appellants lost the opportunity to create the clear legislative history that they had hoped for, see Appendix C herein. The available legislative history may properly be ignored.

4. Assuming *Arguendo* That The Electrical Energy Tax Act Is "Discriminatory" Within The Meaning Of §2121(a) Of The Tax Reform Act Of 1976, §2121(a) Would Be Unconstitutional. The Section Should Not Be Construed So As To Render It Unconstitutional.

While there is a strong presumption as to the validity of Congressional enactments relating to interstate commerce, the presumption is rebuttable, *United States v. Butler*, 296 U.S. 156, 56 S.Ct. 312 (1936). This is true even where Congress has determined for itself that a given condition is harmful to interstate commerce, *Katzenbach v. McClung*, 379 U.S. 294, 85 S.Ct. 377 (1964). The test of the limits of Congressional power are whether a rational basis exists for a finding that a given condition burdens interstate commerce and whether the means Congress selects to eliminate the particular evil are reasonable and appropriate, *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

In the instant case, Congress has banned discriminatory taxation of generation by utilities selling at retail outside the state of generation. Since it is undisputed that the commodity of electricity is taxed by New Mexico at a total rate of 4% when sold in New Mexico and is taxed at a rate less than 2% when it is sold outside New Mexico, the only possible defect in New Mexico's tax scheme is the provision permitting the Electrical Energy Tax to be credited against any Gross Receipts Tax liability. Indeed, Appellants' construction of §2121(a) hinges entirely on that portion of the Senate Finance Committee

report which identifies the credit provision as the defect in New Mexico's scheme (Juris. Statement 13-14).

Appellants' interpretation of §2121(a) would void New Mexico's Electrical Energy Tax while leaving intact other hypothetical tax schemes *which achieve exactly the same results* but without use of the supposedly forbidden credit provision. Examples are set out in the following paragraph. Such an interpretation would render §2121(a) an unreasonable and inappropriate response to the problem of discrimination it confronts and therefore, under the test in *Heart of Atlanta Motel, supra,* an enactment exceeding Congress' powers to regulate interstate commerce. Since it is a court's duty to avoid constructions which render a statute unconstitutional, *United States v. Rumely,* 345 U.S. 41, 73 S.Ct. 543 (1953), Appellant's interpretation of §2121(a) should be rejected.

Many equivalent tax schemes would easily avoid use of a credit provision but safely exact the same or even higher taxes from Appellants. If New Mexico levied its four-tenths of a mill generation tax as it does now, but exempted electricity entirely from its Gross Receipts Tax, the credit provision would be entirely eliminated and the generation tax would be valid under §2121(a). Appellants would pay the same tax they pay now. Similarly, if New Mexico levied the same tax on generation as it does now, but subjected retail sales of electricity in New Mexico to a flat 2% Gross Receipts Tax, the credit provision would also be eliminated. Again, Appellants would pay the same tax they pay now. Finally, if New Mexico levied a generation tax at an effective rate of *four* percent instead of 2% and eliminated retail sales of electricity from the Gross Receipts Tax entirely, the arrangement would again satisfy §2121(a) yet would place Appellants in a far worse position than they are in now.

To say that *total elimination* of New Mexico's tax on retail sales of electricity would satisfy §2121(a) while a *reduction* of

that tax through a credit provision does not, is an absurd construction of the Federal statute. Whether and how New Mexico reduces or eliminates a tax which Appellants have never been required to pay cannot be the controlling test. This unreasonable, and therefore constitutionally impermissible, construction of §2121(a) should be avoided by ignoring the proffered legislative history as inapplicable and by holding New Mexico's Electrical Energy Tax lawful within the test of §2121(a).

5. The Electrical Energy Tax Does Not Impose A Cumulative Burden On Interstate Commerce

Appellants' contention that the generation tax imposes multiple burdens on interstate commerce is premised on the notion that the Electrical Energy Tax is a tax on interstate commerce. This is incorrect, see *Utah Power & Light v. Pfost, supra.* A tax prospectively burdens interstate commerce only if every state which has a connection with that commerce could levy a tax on the same subject, measured on the same basis. See generally, *Western Live Stock v. Bureau of Revenue,* 303 U.S. 250 (1938). Appellants can make no such showing because the entire taxable incident occurs solely within New Mexico. No other state may tax generation occurring in this state and there is no possibility of the duplication of this tax.

6. The Electrical Energy Tax Is Not An Unlawful "Extension" Of New Mexico's Taxing Power And Is Not Violative Of The Due Process Clause Of The Fourteenth Amendment

Appellants' argument here is based on two propositions: the Electrical Energy Tax is upon interstate commerce, and certain New Mexico legislators who were instrumental in passing the tax had an unlawful purpose in mind. The first proposition is incorrect for reasons stated earlier in this brief. As to the second,

even assuming that individual members of the Legislature *intended* to burden or discriminate against interstate commerce, that fact is immaterial. *Heisler v. Thomas Colliery Company,* 260 U.S. 245 (1922), presents a strikingly similar situation. There the plaintiffs claimed that the Governor of Pennsylvania advocated enactment of a tax on coal production because it would exact "tribute" from interstate commerce. The Supreme Court said, at 258-259:

> "The contention that the tax is a regulation of interstate commerce seems to be based somewhat upon the declaration of the Governor of the state of its effect upon consumers in other states. We are unable to discern in the fact any materiality or pertinency, nor in the fact that Pennsylvania has a monopoly (if we may use the word) of the coal. Whether any statute or action of a state impinges upon interstate commerce depends upon the statute or action, not upon what is said about it *or the motive which impelled it,* . . ."
>
> (Emphasis added.)

To the same effect, *Fletcher v. Peck,* 10 U.S. 87, 6 Cranch 87 (1810); *Sonzinsky v. United States,* 300 U.S. 506 (1937); *United States v. Darby,* 312 U.S. 100 (1941); *United States v. O'Brien,* 391 U.S. 367, 383 (1968); *Palmer v. Thompson,* 403 U.S. 217 (1971).

Austin v. New Hampshire, 420 U.S. 656, 95 S.Ct. 1191 (1975), adds nothing to Appellants' case. In contrast to New Mexico's Electrical Energy Tax which all utilities pay whether ultimately selling their electricity in New Mexico or elsewhere, under New Hampshire's commuter tax ". . . no resident of New Hampshire is taxed on his out-of-state income. Nor is the domestic earned income of New Hampshire residents taxed. In effect, then, the State taxes only the income of nonresidents working in New Hampshire . . ." 95 S.Ct. 1193-94.

7. The Electrical Energy Tax Does Not Violate The Import-Export Clause

The assumptions underlying Appellants' contention are that electricity they generate in this state is in fact exported to Mexico and the Electrical Energy Tax is a tax on something other than a local event, that is, a tax upon a "good in transit". Both are incorrect. First, there is no way of knowing what, if any, portion of electricity generated in New Mexico is transmitted to Mexico. Appellants concede that at the time of generation, which is when the Electrical Energy Tax attaches, "the particular market in which it [energy] will be distributed cannot be identified." (Juris. Statement 5).

Second, even assuming that the same electricity generated here finds its way to Mexico, it has long been established that local activities such as mining, manufacturing and generation of electricity are not part of the export process. *Canton R. R. Company v. Rogan,* 340 U.S. 511, 515 (1951), *Coe v. Errol,* 116 U.S. 517 (1886), *Cornell v. Coyne,* 192 U.S. 418 (1903). See also *Utah Power & Light Company v. Pfost, supra; Oliver Iron Mining Company v. Lord,* 262 U.S. 172 (1923); *Hope Natural Gas v. Hall,* 274 U.S. 284 (1927); *Heisler v. Thomas Colliery Company, supra; Champlin Refining Company v. Corporation Commission,* 286 U.S. 210, 235 (1932). A reading of these cases firmly supports the rule that generation of electricity is not part of either interstate commerce or foreign commerce, but instead precedes it.

CONCLUSION

There is a certain disingenuousness in Appellants' alarm concerning the recent enactment of generation taxes in several states, including West Virginia, (Juris. Statement 29). As the record in this case makes clear, it was Appellants who took

great pains to assure that West Virginia's generation tax would not be invalidated by §2121(a), see Appendix C. In any event, there is little question that New Mexico's Electrical Energy Tax is non-discriminatory within the tests enunciated in the case law and codified in §2121(a).

Wherefore, Appellees respectfully submit that the questions upon which this cause depends are so unsubstantial as not to need further argument and Appellees respectfully move the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of New Mexico.

Respectfully submitted,

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Attorney General of New Mexico

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COUNSEL FOR APPELLEES

Original Signed
By Daniel H. Friedman

By _____
DANIEL H. FRIEDMAN

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978

No. 77-1810

ARIZONA PUBLIC SERVICE COMPANY, et al.,
Appellants,

v.

ARTHUR B. SNEAD, Director of the Revenue Division of the Taxation and Revenue Department, et al.,
Appellees.

CERTIFICATE OF SERVICE BY MAIL

Daniel H. Friedman, being a member of the bar of this Court, hereby certifies:

1. That he is an active member of the bar of this Court and that he is an attorney for Appellees, Arthur B. Snead, Director of the Revenue Division of the Taxation and Revenue Department, Revenue Division of the Taxation and Revenue Department, and State of New Mexico.

2. That the Motion to Dismiss or Affirm submitted herewith has been served upon counsel, in accordance with the provisions of Rule 33 of the Rules of this Court, by placing three copies of the same in the United States mail, first class postage

prepaid, properly addressed, this 11th day of August, 1978, to:

Mark Wilmer
Daniel J. McAuliffe
3100 Valley Center
Phoenix, Arizona 85073

Benjamin Phillips
P. O. Box 787
Santa Fe, New Mexico 87501

William C. Schaab
P. O. Box 1888
Albuquerque, New Mexico 87103

Richard N. Carpenter
P. O. Box 669
Santa Fe, New Mexico 87501

Frank Andrews, III
P. O. Box 2307
Santa Fe, New Mexico 87501

3. That the foregoing represents service on all parties required to be served under the provisions of Rule 33, Rules of the United States Supreme Court.

Original Signed
By Daniel H. Friedman

DANIEL H. FRIEDMAN

APPENDIX A

EXCERPT FROM THE BRIEF IN OPPOSITION IN *ARIZONA v. NEW MEXICO*, 425 U.S. 794 (1976).

* * * * *

II. New Mexico's Electrical Energy Tax Neither Discriminates Unconstitutionally Against Interstate Commerce Nor Does It Burden Interstate Commerce.

A. New Mexico's Tax Structure Subjects The In-State Disposition Of Electricity To A Greater Rate Of Taxation Than Electricity Generated For Sale Outside The State; Hence, Under Well-Established Precedents Of This Court The Act Does Not Discriminate Against Interstate Commerce.

* * * * *

1. The Tax Burden On A Particular Taxpayer Or Particular Taxable Incident Is Not Controlling. The Total Tax Structure Must Be Considered In Determining Whether An Unconstitutional Discrimination Exists.

We are not here concerned primarily with the impact of a particular tax on particular taxpayers. Rather, the basic inquiry

must be whether or not New Mexico's total tax structure discriminates against interstate commerce. The correctness of this broad approach has been recognized by this Court in resolving the discrimination question in the early case of *Hinson v. Lott,* 75 U.S. 148 (1869), and the more recent use tax discrimination cases of *Henneford v. Silas Mason Co.,* 300 U.S. 577 (1937), and *Southern Pacific Co. v. Gallagher,* 306 U.S. 167 (1939). It was also recognized by the Supreme Court of Washington and this Court in an electrical energy tax case so analogous to this case as to be dispositive of the issue here presented, *Public Utility District No. 2 of Grant County v. State,* 82 Wn.2d 232, 510 P.2d 206 (1973), appeal dismissed for want of a substantial federal question, 414 U.S. 1106 (1973).*

In the *Public Utility District No. 2* case, the Washington Supreme Court had before it a Washington tax on generation of electricity which allegedly discriminated against utilities that sold electricity out of state. Instead of a credit system like New Mexico's, Washington taxed the sale of power at every level of distribution, but allowed a *deduction* for receipts from resale of the power in-state. If the power was resold out-of-state, the deduction was not available. The utilities argued that the unlawful discrimination occurred because the wholesaler or generator who sold for resale in the state received the deduction, while the wholesaler or generator who sold to an Oregon utility for resale in Oregon did not. To this argument the Washington court responded:

> ". . . a proper analysis must take the whole scheme of taxation into account to determine whether the actual operation of that taxing structure in its relationship to intrastate and interstate commerce results in an unconstitutional discrimination against the latter. [Here the

---

* The appeal to this Court was based on the contention that the Washington electrical energy tax discriminated against interstate commerce in violation of Article I, Sec. 8 of the United States Constitution. The dismissal by this Court means that the case was decided *on the merits* and that lower courts presented with the same issue are bound by the decision. *Hicks v. Miranda,* ____ U.S. ____, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975).

Court footnotes 12 U.S. Supreme Court and state court decisions.]

* * *

"*Considered in isolation,* as urged by respondents, the Washington tax deduction provision may also be discriminatory; it was intended to apply solely to sales for resale within this state. Alone, it may be invalid, but *it does not stand alone,* and this fact, and the failure of the respondents and the trial court below to so recognize, results in their abbreviated analysis. This isolated evaluation led the trial court in Silas Mason Co. v. Henneford, 15 F.Supp. 958 (E.D.Wash. 1936), rev'd, 300 U.S. 577, 57 S.Ct. 524, 81 L.Ed. 814 (1937), to declare invalid the tax in question. Similarly, here, it could lead us to strike down the tax assessment without having correctly evaluated the taxing scheme's operation.

"This scheme contains no constitutional infirmity, for 'There is no demand in [the] Constitution that the state shall put its requirements in any one statute. It may distribute them as it sees fit, if the result, taken in its totality, is within the state's Constitutional power.' Gregg Dyeing Co. v. Query, 286 U.S. 472, 480, 52 S.Ct. 631, 634, 76 L.Ed. 1232 (1932). A similar deduction provision, RCW 82.03.430(6), was at issue in Crown Zellerbach in which a unanimous court found that to disallow the deduction ignores the lawful purpose behind its operation. Imposition of actual tax liability is the purpose advanced by such statutes in an effort to avoid double or triple tax liability as to particular products or activities. 'In other words, the policy is to impose *actual liability* for payment of tax only once. . .' Crown Zellerbach Corp. v. State, supra, 45 Wash. 2d at 753, 278 P.2d at 308." 510 P.2d at 210 [Emphasis added.]

In *Hinson v. Lott, supra,* the combined effect of a distiller's (manufacturing) tax and a merchant's tax on the sale of imported liquor was considered. The merchant's tax was attacked on the ground that it discriminated against interstate commerce, by reason of the fact that it applied only to the sale of liquor

imported into the state. This Court sustained the tax, holding that no discrimination existed, in view of the fact that locally produced liquor, while not subject to the merchant's tax, was subject to the distiller's tax. These taxes were equivalent in amount but imposed on different taxpayers.

In the *Gallagher* and *Henneford* cases, this Court sustained use taxes imposed on products purchased without the state, holding that no discrimination existed in view of the fact that sales taxes were imposed on products sold within the state. This approach has been used to strike down, as well as sustain, state taxes. Thus, in *Halliburton Oil Well Cementing Co. v. Reily,* 373 U.S. 64 (1963), a use tax was found invalid as applied to an out-of-state fabricator using the fabricated goods in Louisiana, but this Court reaffirmed the broad approach of analyzing the entire tax structure. 373 U.S. 69-70.

These cases illustrate the proposition that it is the practical effect of the *total state tax burden* as applied to the commodity of commerce, here electrical energy, which ultimately controls.

2. The New Mexico Tax Structure With Respect To Electrical Energy Does Not Discriminate Against Interstate Commerce.

As clearly established by the cases discussed in the preceding subsection, the total tax burden imposed on different taxpayers or imposed on different aspects of one subject of taxation, here electricity, must be considered together in analyzing a claim of discrimination against interstate commerce. If the commodity of commerce (in *Hinson,* liquor, in *Southern Pacific Co. v. Gallagher* and *Henneford,* tangible personal property and in *Public Utility District No. 2* and in this case electrical energy) is subject to equivalent taxation by the state, whether ultimate use and consumption be within or outside this state, there is no discrimination.

The only basis for any discrimination argument is the credit against gross receipts tax allowed by Sec. 72-16A-16.1(B),

N.M.S.A. 1953 (1975 Interim Supp.), the text of which was set forth previously in this brief. The obvious purpose of this provision is to collect a tax only once from in-state sellers, not to impose the generation tax in addition to the 4% gross receipts tax. The in-state sale of electricity generated in New Mexico is not exempted; it is taxed, just as the out-of-state electricity is, and at the significantly *higher* rate of 4%. The legislative purpose is no different from that found by the Washington Supreme Court in the case of *Public Utility District No. 2 v. State, supra,* where it sustained a privilege tax on electricity so close to the tax at issue here as to the foreclose plaintiff's commerce clause contentions in this case.

The tax in *Public Utility District No. 2 v. State* was a privilege tax on the light and power business measured by gross income. The tax was imposed at every level of distribution. The deduction which allegedly violated the commerce clause read as follows, 510 P.2d at 207, fn. 2:

> "Deductions in computing tax. 'In computing tax there may be deducted from the gross income the following items:
> " '. . . (2) Amounts derived from the sale of commodities to persons in the same public service business as the seller, *for resale* as such *within this state. . .*' " [Emphasis added.]

The public utility districts sold power at wholesale to Washington utilities for resale in Washington. The income from these sales was deductible. They also sold at wholesale to Oregon utilities for resale in Oregon. The income from these sales was not deductible, producing the alleged discrimination. The Washington Supreme Court conceded that, viewed in isolation, the deduction provision could be discriminatory, but it went on to rule that the provision must also be considered in the light of the whole statutory framework for taxation of the subject matter:

> "*The* public utility *tax on electrical power* originating in this state *is to be imposed only once* under the Washington taxing scheme. The deduction here at issue permits this singular tax imposition by preventing the pyramiding

effect of the public utility tax, which is otherwise certain to occur. The only relevant difference between the present case and Crown Zellerbach is that, rather than having an interrelated tax structure (manufacturing-wholesaling) imposed, this case has a shifting tax structure in which singular tax liability exists but shifts to another utility. By so doing, the in-state distribution of the use of power is *not* exempted and is taxed, just as is the out-of-state distribution of power. Equal treatment is the theme of this system. H & D Communications Corp. v. Richland, 79 Wash.2d 312, 484 P.2d 1141 (1971). The out-of-state utility is in no worse position than its instate competitor. The state is playing no favorite with its resident businesses at the expense of similarly situated out-of-state enterprises.

• • •

"The confusion results, in part, because the respondents look only to their status as complaining public utilities at the time of their sales to in-state or out-of-state purchasers, and not to the impact of the total tax structure on the subject matter here involved, the disposition and use of power. *If the whole tax scheme is evaluated, the tax deduction that is made at the sale to a Washington utility is made up at the time the Washington utility buyer sells to its customers.* Thus, 'In the instant case, there is no burden on interstate commerce that is not placed on intrastate commerce.' H & B Communications Corp. v. Richland, supra, 79 Wash.2d at 314, 484 P.2d at 1144. The in-state and out-of-state disposition of power is equally treated. There is tax equivalence here and no discrimination on interstate commerce.

"Judgment reversed." 510 P.2d at 211. [Emphasis added.]

Similarly, New Mexico's intention with respect to electrical energy generated and sold by utilities in New Mexico is that the transactions be taxed only once. Consequently, the legislature has provided that the electrical energy tax may be credited against the gross receipts tax due on subsequent sales in New Mexico. Obviously, the same result could have been accomplished by imposing the type of tax and deduction sustained

in the Washington *Public Utility District No. 2* case. The tax effect is the same in both structures; the difference lies only in the form of the two systems, not in their substance.

There are a number of other precedents which strongly support the constitutionality of New Mexico's choice to allow the electrical energy tax credit against gross receipts tax. These cases consider not the impact of a particular tax on particular taxpayers, but whether the total tax structure with respect to electrical energy discriminates against interstate commerce.

A South Carolina statute containing the credit feature of New Mexico's tax scheme was considered in *South Carolina Power Co. v. South Carolina Tax Commission*, 52 F.2d 515 (E.D.S.C. 1931), aff'd 286 U.S. 525 (1932). South Carolina imposed a tax of 5/10 of one mill upon each kilowatt hour of electric power *generated* in South Carolina and also an excise tax of 5/10 of one mill upon each kilowatt hour of electricity *sold* in the state. This statute provided that if the seller subject to the sales tax procured electric power which was subject to the payment of the privilege tax, a *credit* on the sales tax in the amount of the privilege tax already paid by the person generating the electricity would be allowed. Utilities attacked the South Carolina taxes as unconstitutionally burdening and discriminating against interstate commerce. In commenting upon this statutory scheme the court noted:

> "The evident purpose of the act is to impose a tax upon the current used within the State and to impose it at the source or as soon as the current becomes subject to the jurisdiction of the taxing power, but not to impose but once. . . . If current produced as well as sold within the state were subjected to the sales tax such current would rest under a double burden of taxation. To avoid this and at the same time to preserve the system of taxing at the source, current which is produced within the state is taxed at the time of generation but is relieved of the sales tax, which is equal in amount, with the result that all currents sold within the state, whether produced there or brought in from another state, pays exactly the same tax." 52 F.2d at 521

In resolving the question of validity of the tax on the generation of electrical current, the court upheld the tax on the basis of taxable events *preceding* interstate commerce on authority of *Oliver Iron Mining Co. v. Lord,* 262 U.S. 172 (1923), *Hope Natural Gas Co. v. Hall,* 274 U.S. 284 (1927) and *American Manufacturing Co. v. St. Louis,* 250 U.S. 459 (1919). In reference to current brought into the state which was subject to the sales tax the court said:

> "The point that the tax on sales is a discrimination against current which has passed in interstate commerce, because current which has paid the local generation tax is exempted from the sales tax, has already been considered in discussing the points raised under the Fourteenth Amendment. The cases of Hinson v. Lott, supra, 8 Wall.148, 19 L.Ed. 387 and Doscher v. Query, supra (D.C.) 21 F. (2d) 521, 525, sufficiently answer this proposition." 52 F.2d at 526.

Citing the *South Carolina Power* and *Hinson* cases, *Oldetyme Distillers, Inc. v. Gordy,* 17 F.Supp. 424 (D.Md. 1936) also held that a whiskey manufacturing tax credit against a subsequent sales tax did not discriminate against interstate commerce.

The totality of a state's pattern of taxation was recognized by this Court in the license tax case of *Alaska v. Arctic Maid,* 366 U.S. 199 (1961). Alaska imposed a "license" tax upon only the business of operating freezer ships and other floating cold storages, measured by the value of fish obtained for processing through freezing. In fact, the tax fell only upon out-of-state businesses because they were the only ones who operated freezer ships. The ship operators purchased fish caught in Alaskan territorial waters, froze the fish and then transported the fish to the State of Washington for canning. They alleged that the Alaskan taxing scheme discriminated against their interstate businesses because (1) there was no tax on fish caught and frozen in Alaska and destined for canning in Alaska, and (2) fish processors selling fresh frozen fish in the Alaskan consumer market were taxed at a lower rate.

This Court first found that the license tax was imposed upon an occupation made up of local activities within the reach

of Alaska's taxing authority, citing *Oliver Iron Mining v. Lord, supra,* and *Michigan-Wisconsin Pipe Line Co. v. Calvert,* 347 U.S. 157 (1954). It then held that the tax in question did not discriminate against interstate commerce because in-state businesses which had to pay other local taxes rather than the license tax, were not preferred against out-of-state competitors. The Court reasoned that there could be no discriminatory preference in favor of local canners because they paid a greater tax upon fish obtained for canning. The Court stated:

> "When we look at the tax laid on local canners and those laid on 'freezer ships', there is no discrimination in favor of the former and against the latter. For no matter how the tax on 'freezer ships' is computed, it did not exceed the six per cent tax on the local canners. Hence cases such as Pennsylvania v. West Virginia [citation omitted] which hold invalid state laws that prefer local sales or interstate sales, are inapposite." 366 U.S. at 204-205.

In this case, the generation tax on electrical energy, no matter how it is computed, does not exceed the 4% burden on in-state disposition of power.

In *Gregg Dyeing Co. v. Query,* 286 U.S. 472 (1931), this Court upheld a complementary taxing statute imposed on gasoline brought into the state for storage, use and consumption against the contention that the statute discriminated against interstate commerce. In disposing of this argument, the Court construed a separate statute *in pari materia* and concluded it imposed an equivalent tax on use and consumption of gasoline in the state.

Henneford v. Silas Mason Co., supra, Southern Pacific Co. v. Gallagher, supra, and *Hinson v. Lott, supra,* also support the proposition that New Mexico's generation tax and gross receipts tax credit work no discrimination against plaintiffs because the New Mexico burden on in-state disposition of electricity is greater than the generating tax on electricity taken out of New Mexico.

New Mexico's tax structure with respect to electricity is not distinguishable constitutionally from the electrical energy tax cases of *Public Utility District No. 2* and *South Carolina Power Co.*; the liquor cases of *Hinson v. Lott* and *Oldetyme Distillers;* the sales and use tax cases of *Gallagher* and *Henneford v. Silas Mason Co.*; and the license tax case of *Arctic Maid.* These cases establish that the tax burden imposed on different taxpayers or imposed on different incidents of taxation must be considered together in resolving the discrimination issue. And they held that there is no discrimination against interstate commerce if the commodity of commerce, here electrical energy, is subject to equivalent taxation by the state, whether or not the ultimate use and consumption is within or without the state.

The issue of discrimination against interstate commerce is a practical one, not an abstract or academic question. As stated by this Court in *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 45 fn. 2 (1940):

> "Despite mechanical or artificial distinctions sometimes taken between the taxes deemed permissible and those condemned, the decisions appear to be predicated on a practical judgment as to the likelihood of the tax being used to place interstate commerce at a competitive disadvantage." [Reference to numerous cases follows in the footnote.]

In the *Arctic Maid* case, the Court reasoned that there could be no such discriminatory competitive preference, since Alaskan processors freezing fish for the local retail market were not in competition with processors freezing fish for canning out of state. This was precisely the same reasoning approved by this Court in the *Public Utility District No. 2* case where it was held that there was no discriminatory preference for in-state business because:

> ". . . the public utility districts selling out-of-state are not in competition with one who sells in-state." 510 P.2d at 210.

Similarly, the Arizona utilities taxed under the Electrical Energy Tax Act are not in competition with New Mexico electrical utilities, and plaintiff does not allege that they are.

New Mexico seeks to tax the generation of electrical energy in this state. All generators of electrical energy in this state must pay the tax. That the electrical energy tax may be credited against gross receipts tax is only to prevent in-state power from being subjected to more than a 4% tax. It does not have the effect, under New Mexico's tax structure, of exempting the in-state generation and sale of power. This state's tax structure on electrical energy is designed to subject to one tax, but only one tax, the commodity of electrical energy. The taxation of this subject does not discriminate against interstate commerce.

In its complaint (second cause of action, Par. IV) and brief (pp. 21, 23, 26) Arizona makes much over its allegation that the New Mexico legislature intended to discriminate against Arizonans and interstate commerce. This allegation is reminiscent of the one made in *Heisler v. Thomas Colliery Co.*, 260 U.S. 245 (1922). There, plaintiffs claimed that the Governor of Pennsylvania advocated enactment of a tax on coal production because it would exact "tribute" from interstate commerce. This Court said, 260 U.S. 258-59:

> "The contention that the tax is a regulation of interstate commerce seems to be based somewhat upon the declaration of the Governor of the State of its effect upon consumers in other States. We are unable to discern in the fact any materiality or pertinency, nor in the fact that Pennsylvania has a monopoly (if we may use the word) of the coal. Whether any statute or action of a State impinges upon interstate commerce depends upon the statute or action, not upon what is said about it or the motive which impelled it. . . ."

APPENDIX B

TEXT OF §2121 (FORMERLY §1323) OF THE TAX REFORM ACT OF 1976 AS APPROVED BY THE SENATE FINANCE COMMITTEE AND PASSED BY THE SENATE, PRIOR TO AMENDMENT IN THE HOUSE-SENATE CONFERENCE COMMITTEE (R. 1, 031)

SEC. 1323. PROHIBITION OF DISCRIMINATORY STATE TAXES ON PRODUCTION AND CONSUMPTION OF ELECTRICITY.

(a) IN GENERAL.–The Act entitled "An Act relating to the power of the States to impose net income taxes on income derived from interstate commerce, and authorizing studies by congressional committees of matters pertaining thereto", approved September 14, 1959 (73 Stat. 555; 15 U.S.C. 381 et seq.) is amended by striking out title II (relating to studies) and inserting in lieu thereof the following:

"TITLE II–DISCRIMINATORY TAXES

"Sec. 201. (a) No State, or political subdivision thereof, may impose or assess a tax on or with respect to the generation of electricity for transmission in interstate commerce which is discriminatory against out of State manufacturers, producers, wholesalers, retailers or consumers of that electricity. For purposes of this section a tax is discriminatory that either directly or indirectly results in the payment of a higher gross or net tax on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.

"(b) EFFECTIVE DATE.–The amendment made by subsection (a) applies with respect to taxable years beginning after June 30, 1974."

APPENDIX C

LETTER FROM COUNSEL FOR ARIZONA PUBLIC SERVICE CO. TO SENATOR PAUL J. FANNIN (R.701-702)

Law Offices, SNELL & WILMER
(Letterhead omitted)

3100 Valley Center
Phoenix, Arizona 85073

June 10, 1976

The Honorable Paul J. Fannin
United States Senator
3121 Dirkson Senate Building
Washington, D.C. 20510

Dear Senator Fannin:

On the way back from Washington and while here, I have reviewed in much greater detail the proposed Amendment to Section 1322. I am enclosing what we consider to be far better language.

The first sentence should read as follows:

SEC. 201

(a) No state, or political subdivision thereof, may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out of state manufacturers, producers, wholesalers, retailers or consumers of that electricity.

Upon reflection, this change is critical. Without it, the State of New Mexico will simply make the argument that Section 201(a) does nothing but prohibit taxes on interstate commerce, the very argument they are making in Court today on the challenge to the generation tax. The old language is susceptible to the interpretation that the New Mexico generation tax is imposed upon the local event of generation and not upon the "generation of electricity for transmission in interstate commerce". If there is any way in which the language can be changed to the above, it should be done.

We have also changed the second sentence to read as follows:

> For purposes of this section a tax is discriminatory that results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.

While this change is not as critical as the change in the first sentence, we do think that you might have difficulty with Senator Byrd with the old language. After reading carefully the West Virginia Statute and the case of *Virginia Electric and Power Company v. Haden,* 200 S.E. 2d 848 (W. Va., 1973), it is our opinion that with the phrase "gross or net" included, Virginia consumers, or out-of-state producers of electricity operating in West Virginia, could well argue that this bill prohibits West Virginia's tax. With the language as we have changed it, we do not feel that that argument will be available to them.

It is my understanding that the language has already come out of the Committee, and, therefore, the above changes may be difficult to make. However, Senator Byrd might well be of assistance in that respect in light of the above.

Finally, it is imperative that a clear legislative history be made. Without it, we could probably dream up another dozen arguments that it does not apply to the generation tax in New Mexico. None of them would withstand a good legislative history, however. We think the legislative history should include that the language in the second sentence is intended to include the New Mexico generation tax specifically.

Thank you for your continued cooperation in this matter and our continued best wishes.

Very truly yours,

s/ Bruce Norton

Bruce Norton

BN:cd
Enclosure